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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 LARRY ROSSER,
12 CDCR #K-26537,

13 Plaintiff,

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15 vs.
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18 H. SANCHEZ; E. APODACA; R.
19 CROMBIE; R.A. DAVIS; R. ACEVEDO;
20 G.J. JANDA; DAGDAGEN; MENDEZ;
21 TIM OCHOA; D. EDWARDS;
22 G. GIURBINO; JOHN OR JANE DOE,
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24 Defendants.
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Civil No. 10cv1037 JAH (WVG)

ORDER:

**(1) GRANTING PLAINTIFF'S
MOTION TO PROCEED IN
FORMA PAUPERIS, IMPOSING NO
INITIAL PARTIAL FILING FEE
AND GARNISHING BALANCE
FROM PRISONER'S TRUST
ACCOUNT PURSUANT
TO 28 U.S.C. § 1915(a)
[Doc. No. 8];**

AND

**(2) DIRECTING U.S. MARSHAL TO
EFFECT SERVICE OF COMPLAINT
PURSUANT TO FED.R.Civ.P. 4(c)(3)
& 28 U.S.C. § 1915(d)**

24 Larry Rosser ("Plaintiff"), a state prisoner currently incarcerated at High Desert State
25 Prison located in Susanville, California, and proceeding in pro se, has filed a civil rights
26 Complaint pursuant to 42 U.S.C. § 1983. Plaintiff claims that his constitutional rights were
27 violated when he was housed a Calipatria State Prison in 2008 and 2009.

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1 Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead he
2 has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc.
3 No. 8].

4 **I.**

5 **MOTION TO PROCEED IFP**

6 All parties instituting any civil action, suit or proceeding in a district court of the United
7 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
8 U.S.C. § 1914(a). An action may proceed despite a party’s failure to prepay the entire fee only
9 if that party is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
10 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Prisoners granted leave to proceed IFP however,
11 remain obligated to pay the entire fee in installments, regardless of whether their action is
12 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847
13 (9th Cir. 2002).

14 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.
15 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to
16 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff’s trust account statement indicates
17 that he has insufficient funds from which to pay filing fees at this time. *See* 28 U.S.C.
18 § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil
19 action or appealing a civil action or criminal judgment for the reason that the prisoner has no
20 assets and no means by which to pay the initial partial filing fee.”). Therefore, the Court
21 **GRANTS** Plaintiff’s Motion to Proceed IFP [Doc. No. 8] and assesses no initial partial filing
22 fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the filing fees mandated
23 shall be collected and forwarded to the Clerk of the Court pursuant to the installment payment
24 provisions set forth in 28 U.S.C. § 1915(b)(1).

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However, the Secretary of the CDCR, or his designee, shall collect this initial fee *only if sufficient funds in Plaintiff's account are available at the time this Order is executed* pursuant to the directions set forth below. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil action or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.”); *Taylor v. Delatoore*, 281 F.3d 844, 850 (9th Cir. 2002) (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay ... due to the lack of funds available to him when payment is ordered.”). The remaining balance shall be collected and forwarded to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

II.

SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

The PLRA also obligates the Court to review complaints filed by all persons proceeding IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof, which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A); see also *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing § 1915A).

“[W]hen determining whether a complaint states a claim, a court must accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,

839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). However, in giving liberal interpretation to a pro se civil rights complaint, the court may not “supply essential elements of claims that were not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss.” *Id.*

As currently pleaded, the Court finds Plaintiff’s allegations sufficient to survive the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). *See Lopez*, 203 F.3d at 1126-27; *Farmer v. Brennan*, 511 U.S. 825 833-34 (1994) (“Prison officials have a duty ... to protect prisoners from violence.”). Accordingly, the Court finds Plaintiff is entitled to U.S. Marshal service on his behalf. *See* 28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve all process, and perform all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(3) (“[T]he court may order that service be made by a United States marshal or deputy marshal ... if the plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915.”). Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative of, and not a substitute for, any subsequent Rule 12[] motion that [a defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

III.

CONCLUSION AND ORDER

Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

1. Plaintiff’s Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 8] is **GRANTED**.

2. The Secretary of California Department of Corrections and Rehabilitation, or his designee, shall collect from Plaintiff’s prison trust account the \$350 balance of the filing fee owed in this case by collecting monthly payments from the account in an amount equal to twenty percent (20%) of the preceding month’s income and forward payments to the Clerk of the Court each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**

1 ASSIGNED TO THIS ACTION.

2 3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
3 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
4 Sacramento, California 95814.

5 **IT IS FURTHER ORDERED** that:

6 4. The Clerk shall issue a summons as to Plaintiff's Complaint [Doc. No. 1] upon
7 Defendants and shall forward it to Plaintiff along with a blank U.S. Marshal Form 285 for
8 each Defendant. In addition, the Clerk shall provide Plaintiff with a certified copy of this Order
9 and a certified copy of his Complaint and the summons so that he may serve Defendants. Upon
10 receipt of this "IFP Package," Plaintiff is directed to complete the Form 285s as completely and
11 accurately as possible, and to return them to the United States Marshal according to the
12 instructions provided by the Clerk in the letter accompanying his IFP package. Upon receipt,
13 the U.S. Marshal shall serve a copy of the Complaint and summons upon Defendants as directed
14 by Plaintiff on the USM Form 285s. All costs of service shall be advanced by the United States.
15 *See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

16 5. Defendants are thereafter **ORDERED** to reply to Plaintiff's Complaint within the
17 time provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See* 42
18 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to "waive the right to
19 reply to any action brought by a prisoner confined in any jail, prison, or other correctional
20 facility under section 1983," once the Court has conducted its sua sponte screening pursuant to
21 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary determination based
22 on
23 the face on the pleading alone that Plaintiff has a "reasonable opportunity to prevail on the
24 merits," the defendant is required to respond).

25 6. Plaintiff shall serve upon the Defendants or, if appearance has been entered by
26 counsel, upon Defendants' counsel, a copy of every further pleading or other document
27 submitted for consideration of the Court. Plaintiff shall include with the original paper to be
28 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy

1 of any document was served on Defendants, or counsel for Defendants, and the date of service.
2 Any paper received by the Court which has not been filed with the Clerk or which fails to
3 include a Certificate of Service will be disregarded.

4 DATED: July 14, 2010


5 **HON. JOHN A. HOUSTON**

6 United States District Judge
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